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IN THE

Supreme Court of the United States

October Term, 1963
No. 862

BERNARD REICH and SYLVIA REICH, depositors and members of BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION, individually and in behalf of BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION and the other depositor-members of said association, similarly situated,

Petitioners,

vs.

EUGENE WEBB, JR., MARGUERITE R. WEBB and BEVERLY HILLS FEDERAL SAVINGS AND LOAN ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

Brief of Respondents Eugene Webb, Jr. and Marguerite R. Webb, in Opposition to Petition for Writ of Certiorari.

Preliminary Statement.

These respondents believe that two considerations should influence this Honorable Court's decision whether or not to grant certiorari in the instant case, to wit: (1) does jurisdiction to grant certiorari exist upon the ground claimed by petitioners; and (2) even if such jurisdiction exists, are factors present which

militate against the desirability of exercising jurisdiction at this time?

In order to invoke this Court's jurisdiction under 28 U. S. C. §1257(3), as petitioners have done, it must be shown that a "title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." Respondent Beverly Hills Federal Savings and Loan Association in its brief filed in opposition to the petition for certiorari has demonstrated that jurisdiction does not exist as claimed by petitioners. To the statements therein made, these respondents would add the following observations on the question of jurisdiction.

Petitioners claim (Petn. pp. 3-5) that the California courts so construed the Home Owners' Loan Act of 1933 as to create an immunity from suit. Respondents at no time so contended, and the California courts made no such determination. What the trial court stated, and what the appellate courts affirmed, is that *as a matter of California law* petitioners were required to exhaust their administrative remedy before turning to the courts for relief. The judgment was, therefore, based upon an independent and adequate nonfederal ground, and under familiar principles this Court will not interfere with such a determination of state law.

These respondents do not, however, rest their opposition merely upon a want of the jurisdiction invoked by petitioners. As we shall now demonstrate, even if probable jurisdiction were to exist, there are compelling reasons which contra-indicate its exercise upon the present posture of the case.

ARGUMENT.

I.

The Matters Complained of Are Within the Province of the Federal Home Loan Bank Board, and Petitioners Have an Administrative Remedy Before That Agency Which Must First Be Exhausted.

A. Nature of the Problem Presented.

Petitioners seek to have the California courts interfere with the internal management and control of a federal savings and loan association. Their first amended complaint alleged that there had been a wrongful transfer of "control" of the Association, assertedly accomplished in part by the resignation of the Webbs as directors of the Association and partly by transfer of proxies [C. T. pp. 25-26]. The instant petition, however, focuses attention only upon the charge of wrongful transfer of proxies (see, *e.g.*, Petn. pp. 2, 6, 8). As we shall see, apart from the question of transfer of proxies, the Board has adopted regulations pertaining to the resignation of directors as well as their powers, and the necessity for administrative interpretation of those regulations is apparent.

Throughout their brief, petitioners emphasize the claimed breach of fiduciary duties and contend that the Board's regulations do not cover breach of fiduciary duties (see, *e.g.*, Petn. pp. 2, 4, 6, 13). The purported breach of fiduciary duties, however, had its genesis in *acts*, and the regulations adopted by the Board definitely impinge upon the acts assertedly committed by respondents. This requires a determination by the Board as to whether or not there has been a breach of fiduciary duties, as petitioners contend.

B. Petitioners' Pleading Tenders Issues Requiring Prior Resort to Their Administrative Remedy.

Petitioners' second cause of action is stated by them to be the critical cause of action in the complaint (Petn. p. 12). That cause of action [C. T. pp. 25-27] alleges that the Webbs transferred "control" of the Association to Lytton Financial, which said transfer was accomplished partly by the resignation of the Webbs and others as directors of the Association and partly by transfer of proxies. Petitioners as depositor-members of the Association seek to assert derivatively the claimed right of the Association to recover moneys paid to the Webbs, allegedly for such transfer of control.

California appellate courts have consistently ruled that if a controversy involves matters (a) affecting the internal management, operation or *control* of a federal savings and loan association, or (b) requiring interpretation of applicable rules and regulations prescribed by the Board, the courts have no power to act until the complainant has exhausted his rights under the Board's administrative process, whereas if the controversy involves a private dispute between such an association and one of its members or a person dealing with the association, such a dispute may be taken directly to the courts without interposition of administrative process. *Woodard v. Broadway Federal S. & L. Assn.* (1952) 111 Cal. App. 2d 218, 224-225, 244 P. 2d 467; *Larwood Co. v. San Diego Federal S. & L. Assn.* (1960) 185 Cal. App. 2d 450, 454-456, 8 Cal. Rptr. 362; *People v. Metrim Corp.* (1960) 187 Cal. App. 2d 289, 292-293, 9 Cal. Rptr. 584. Furthermore, under California law it lies within the power of the Board to determine in the first instance whether a con-

troversy with respect to the internal management of an association *is* within its sphere of jurisdiction, and the trial court has no jurisdiction to act until that determination has first been made by the Board. *Woodward v. Broadway Federal S. & L. Assn., supra,* at 224-225; *Larwood Co. v. San Diego Federal S. & L. Assn., supra,* at 453. This latter principle of conferring the initial determination as to jurisdiction to act upon the administrative body has heretofore been applied by this Court. *San Diego Bldg. Trades Council v. Garmon* (1959) 359 U. S. 236, 244-245. The principle has been applied also at the Court of Appeals level. See *D. G. Bland Lumber Co. v. N. L. R. B.* (5th Cir. 1959) 177 F. 2d 555, 557.

The distinction between cases pertaining to corporate internal affairs, as distinguished from private disputes, has been defined as follows:

> "Where the act complained of affects the complainant solely in his capacity as a member of the corporation, whether it be as stockholder, director, president, or other officer, and is the act of the corporation, whether acting in stockholders' meeting, or through its agents, the board of directors, then such action is the management of the internal affairs of the corporation. . . . Where, however, the act of the foreign corporation complained of affects the complainant's individual rights only, then our courts will take jurisdiction, whenever the cause of action arises here."
>
> *North State Copper & Gold Mining Co. v. Field* (1885) 64 Md. 151, 20 Atl. 1039, 1940.

Applying the foregoing definition to the allegations of petitioners' pleading, who can fault the District

Court of Appeal in deciding (Appendix B to Petn., pp. 9-10) that the controversy pertains to internal affairs of management, organization and control of the Association? This follows because petitioners are contending that the monies paid to the Webbs should be turned over to the Association [C. T. p. 28], which said monies would in turn be distributable to petitioners *as members of the Association* upon a liquidation, dissolution, or winding up of said corporation. 12 Code of Federal Regulations, Sec. 544.1(b)10. Furthermore, the acts complained of are the acts of the corporation because these respondents, *acting as directors of the Association*, assertedly transferred control of the Association to Lytton.

Under the circumstances, the *Woodard* and *Larwood* cases require exhaustion of administrative remedies before resort may be had to the courts.

C. The Board Has Adopted Regulations Which Impinge Upon the Issues Cast by the Complaint, and Those Regulations Should Be Interpreted by the Board.

These respondents showed in their brief filed with the District Court of Appeal (Br. pp. 8-14) that the Board has adopted regulations bearing upon each of the purported causes of action in the first amended complaint. Respondents will not burden the record with a restatement of those regulations, except to point out that the matters of resignation of directors and exercise of powers by the Association's board of directors (which underlie the second cause of action and serve as the predicate for the claimed breach of fiduciary duty) are embraced within the form of by-laws prescribed for this Association and provided for in Part 544, Sec. 544.5, subdivs. 6 and 7, of the Board's rules

and regulations. 12 Code of Fed. Regs., Sec. 544.5. If there is any uncertainty as to the effect of those by-law provisions upon the conduct complained of in the second cause of action, the Board, which promulgated those by-laws, should be given the first opportunity to construe their impact upon the situation, thereby promoting uniformity and consistency in the regulation of federal savings and loan associations.

Whether the problem in a given case be one of primary jurisdiction in an administrative agency or exhaustion of administrative remedies,* the guiding principle should be that heretofore enunciated by this Court:

> ". . . in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. *Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by spe-*

*Professor Davis opines that *Woodward v. Broadway Federal S. & L. Assn.* relied on by the California District Court of Appeal in this case involves primary jurisdiction, rather than exhaustion of administrative remedies. 3 Davis, Administrative Law Treatise (1958) sec. 19.08, p. 51. It is fundamental that the primary jurisdiction doctrine applies even if the administrative agency has no jurisdiction to grant the relief sought. *Idem*, sec. 19.07, p. 39.

cialization, by insight gained through experience, and by more flexible procedure." (Emphasis supplied).

Far East Conference v. United States (1951) 342 U. S. 570, 574-575.

See also:

United States v. Western Pacific Railroad Co. (1956) 352 U. S. 59, 64-66.

When that principle is applied to the case at bar, the conclusion is inescapable that petitioners should be required to exhaust their administrative remedy before the Board before turning to the courts for relief, in order to utilize the Board's expertise in matters affecting federal savings and loan associations.

D. Petitioners Have an Administrative Remedy Before the Board.

Section 542.2 of Part 542 of the Board's rules and regulations provides for the granting of a hearing at the request of any person who has made an application or petition to the Board pursuant to any provision of parts 543, 544, 545 or 546 of the subchapter. Petitioners in a footnote to their petition (footnote 2, p. 18) attempt to brush off this administrative remedy upon the basis that "Those subchapters are each admittedly irrelevant to any of the claims in this action." To the contrary, as shown by these respondents in their brief before the District Court of Appeal (Br. pp. 8-14), the regulations found in subchapters 544 and 545 have a very material bearing upon the issues of this case.* Petitioners' similarly cavalier treatment

*First Cause of Action of amended complaint: Section 545.6-10 of Part 545 of the Board's ruling and regulations; Second Cause

in that footnote of the further provision in Section 542.2 of the regulations that "The Board may order a hearing in connection with the consideration of any matters arising under any provision of the rules and regulations of this sub-chapter, whether or not any request therefor has been made by any person." does not detract from the effect of that provision in conferring an administrative remedy.

Petitioners' pique seems to lie in the fact that once having initiated the administrative proceeding, they may be supplanted by the Board in representation of the Association (Petn. p. 15). Indeed, the entire tenor of the petition is that they as depositors in the Association should be permitted to enforce asserted rights of the Association in derogation of the authority of the Board. These respondents in their brief before the District Court of Appeal (Br. pp. 10-17) questioned the soundness of equating petitioners with stockholders in a profit-making corporation so as to have the standing to assert derivatively a purported cause of action inhering in the Association. Our position in this regard is echoed in the *Daurelle* case cited by petitioners (Petn. p. 27). See *Daurelle v. Traders Federal S. & L. Assn.* (1958) 143 W. Va. 674, 104 S. E. 2d 320, 332-333.

E. The Instant Decision Does Not Conflict With Decisions of This Court.

The decisions of this Court cited at pages 19-20 of the petition in no way conflict with the decision of the District Court of Appeal. In the *Greene* case

of Action: Section 544.5, Subdivs. 6 and 7 of Part 544; Third Cause of Action: Section 545.6-5 of Part 545.

(Petn. p. 19) this Court declined to apply retroactively a regulation adopted in 1960 so as to require exhaustion of an administrative remedy not required under a 1955 directive. The factual setting there is in no way analogous to the case at bar. In *Skinner and Eddy* (Petn. p. 19) the problem was one of an agency's exceeding its statutory powers; no such question obtains here. The *Alkali Export Association* case (Petn. pp. 19-20) treated of functions of the Federal Trade Commission under §5 of the Webb-Pomerene Act. According to this Court, that Commission's recommendation "need not be followed by any court or administrative or executive officer." (325 U. S. 196, 210); whereas the regulations of the Federal Home Loan Bank Board have the force and effect of law and are binding on an association, its board of directors, its officers and its members (see authorities cited at page 5 of these respondents' brief before the District Court of Appeal). Furthermore, the Board is by statute empowered to act in its own name and through its attorneys in enforcement of the Home Owners Loan Act and regulations made thereunder. 12 U. S. C. A. §1464(d)(1).

In *Township of Hillsborough* (Petn. p. 20), uncertainty existed concerning the meaning of a local law, and the remedy, if any, was speculative. As previously shown, here there is a clear-cut right on the part of the Reichs to petition for an administrative hearing. Should the Board determine after a hearing that pe-

titioners' claims have merit, there is ample provision made by law for prosecution of the Association's rights, either by the Board in its own name or by a conservator or receiver appointed by the Board for that purpose. 12 U. S. C. A. §1464(d)(1) and (2).

Petitioners find in this Court's decisions in the *Agnes K. Head* and *Colorado Anti-Discrimination Committee* cases (Petn. pp. 22-25) a claimed inconsistency with the decision in this case. A mere reading of those decisions demonstrates their inapplicability to the instant case.

In both the *Head* and *Colorado* cases the problem presented was one of claimed federal preemption of the field. In each case this Court found no evidence of a Congressional design to preempt the field; the legislation was upheld as a proper exercise of the state's police power. One of the most significant distinctions between those cases and the case at bar is pointed up by the quotation given by petitioners (Petn. p. 24) from the *Head* case wherein this Court was shown to be speaking of "areas of the law not inherently requiring national uniformity." In the instant case, national uniformity in the interpretation and application of the Board's regulations affecting federal savings and loan associations is of paramount importance and calls for initial reference of such matters to the Board for the reasons stated by this Court in the *Far East Conference* case.

II.

Since the Ruling Complained of, Matters Have Occurred Which Render the Pending Petition Moot, as Shown by the Record Before This Court.

Petitioners state (Petn. p. 14), "In 30 years of enforcement of the act the board *had* never sued a director for breach of fiduciary duty and *had* never commenced an administrative proceeding against a director for breach of fiduciary duty." (Emphasis supplied). A further intimation of the supervening facts is given by petitioners (Petn. p. 27, footnote 4) when they show that the Board has asserted jurisdiction with respect to petitioners' claims by the filing of a cross-claim against these respondents and others in pending litigation in the United States District Court for the Southern District of California. Petitioners in their opening brief before the California District Court of Appeal in this action (Op. Br. p. 35, note 1; Appendix B to Op. Br. pp. 4-5) adverted to the following matters occurring since the ruling of which they complain and thereby invited consideration by the state appellate court, and by this Court, of such facts:

After the ruling complained of, the Board initiated proceedings against the respondents herein with respect to the charges made by petitioners. Respondent Beverly Hills Federal Savings and Loan Association thereafter filed an action for declaratory relief against the Board in the United States District Court for the Southern District of California. The Board filed a counterclaim and cross-claim therein in which it sought substantially the relief which petitioners here seek. Petitioners filed a motion to intervene in that action.

which was denied upon the grounds that the District Court had jurisdiction to give judgment on the counterclaim of the Board and that the Board adequately represented petitioners' interest. Petitioners have appealed to the United States Court of Appeals for the Ninth Circuit from denial of their motion for leave to intervene; that appeal has been briefed, argued, and stands submitted for decision.

Thus, not only has the administrative agency acted upon petitioners' grievances; it has taken affirmative action along the lines which petitioners seek to pursue. Under these circumstances, unless petitioners are to be permitted to supersede the administrative agency having regulatory power over federal savings and loan associations, they must give way to the assertion of a superior representative right.

Noteworthy also is the fact that *petitioners* by their own admission (see Appendix B, page 6 to their Opening Brief in the California District Court of Appeal) *have filed a separate and independent action* in the United States District Court for the Southern District of California *against respondents asserting essentially the same claims made in the complaint in this case*, which said action is now pending. These respondents submit that by thus engaging in judicial leapfrog, petitioners demonstrate a marked disrespect for the orderly processes of the law and are openly flaunting the authority of both state and federal courts. Such conduct should not be condoned.

Conclusion.

It clearly appears from the record before this Court that the Board as *parens patriae* is protecting the interests of petitioners and all other members of the Association, and therefore judicial intervention by the Superior Court of the State of California for the County of Los Angeles is not only unnecessary but would tend to interfere with the jurisdiction over the controversy which has been assumed by the federal courts. Under such circumstances a paraphrase of this Court's statement in the *Far East Conference* case appears most appropriate: "Business-like procedure counsels that the [petitioners'] complaint should now be dismissed . . ." (342 U. S. 570, 577).

The petition for writ of certiorari should be denied.

Respectfully submitted,

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